Supreme Court, U.S.
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No. ———

In the Supreme Court of the United States

FRANK LORDI,

Petitioner,

v.

TODD ISHEE, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In federal habeas corpus proceedings in which ineffective assistance of counsel is claimed as a ground for relief, does the applicability of *Cuyler v. Sullivan*, 446 U.S. 355 (1980), to attorney conflicts of interest arising from the prior representation of a prosecution witness constitute "clearly established law as determined by the Supreme Court of the United States" within the meaning of 28 U.S.C. § 2254 and *Williams v. Taylor*, 529 U.S. 362 (2000)?

2. In federal habeas corpus proceedings in which juror bias is claimed as a ground for relief, does the obligation of a state trial judge to investigate an allegation that an impaneled juror has referred to the defendant by stating "that guy is guilty" while in the presence of other jurors constitute "clearly established law as determined by the Supreme Court of the United States" within the meaning of 28 U.S.C. § 2254 and *Williams v. Taylor*, 529 U.S. 362 (2000)?

3. In federal habeas corpus proceedings in which a procedural default is alleged, does the failure of appellate counsel to raise an obviously meritorious claim of juror bias on direct appeal constitute cause and prejudice if the state court decision enforcing the procedural bar is itself "contrary to, or an unreasonable application of, clearly established law as determined by the Supreme Court of the United States" within the meaning of 28 U.S.C. § 2254 and *Williams v. Taylor*, 529 U.S. 362 (2000)?

PARTIES TO THIS PROCEEDING

All parties to this proceeding are listed in the caption. Pursuant to United States Supreme Court Rule 12.6, Warden Ishee is the proper Respondent by virtue of being a party to the judgment of the United States Court of Appeals which is being challenged in this petition.

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Petitioner Frank Lordi respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Sixth Circuit are reported as *Lordi v. Ishee*, 384 F.3d 189 (6th Cir. 2004). App., *infra*, 3a-20a. The opinion of the United States District Court for the Northern District of Ohio is unreported. App., *infra*, 21a-25a. The opinion of the Ohio Court of Appeals for the Seventh Appellate District adjudicating Petitioner's direct appeal is reported as *State v. Lordi*, 748 N.E.2d 566 (Ohio App. 2000). App., *infra*, 39a-54a. The opinion of the Ohio Court of Appeals for the Seventh Appellate District denying Petitioner's additional claims on reconsideration is unreported. App., *infra*, 29a-38a. The opinion of the Ohio Court of Appeals for the Seventh Appellate District denying Petitioner's claim of ineffective assistance of appellate counsel is unreported. App., *infra*, 26a-28a.

JURISDICTION

The United States Court of Appeals entered its judgment on September 10, 2004. App., *infra*, 3a. Petitioner entered a timely request for rehearing and suggestion for rehearing en banc, which was denied on January 6, 2005. App., *infra*, 1a. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a claim for habeas corpus relief pursuant to 28 U.S.C. § 2241(a) and 28 U.S.C. §2254(d) as amended by the Antiterrorism and Effective Death Penalty Act of 1996. The underlying substantive claims are predicated upon the Assistance of Counsel and Jury Trial Clauses of the Sixth Amendment, as made applicable to the Several States by the Due Process Clause of the Fourteenth Amendment.

Section One of the Fourteenth Amendment to the Federal Constitution states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section Five of the Fourteenth Amendment to the Federal Constitution states:

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

28 U.S.C. § 2241(a) states:

> Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts

and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

28 U.S.C. § 2254(d) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Sixth Amendment to the Federal Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner was charged under Ohio law with various offenses in the Mahoning County Court of Common Pleas. App., *infra,* 40a-44a. The charges against Petitioner related to his service as a Mahoning County Commissioner, a position to which he had been elected. App., *infra,* 40a-44a. Following a jury trial, Petitioner was convicted of one count of theft in office, one count of unlawful interest in a public contract, and two counts of conflict of interest on February 24, 1999. App., *infra,* 44a. Petitioner was acquitted of the remaining twelve counts. App., *infra,* 44a.

I. Statement relating to Petitioner's claim of ineffective assistance of counsel.

Petitioner's claim that he was denied the effective assistance of counsel in violation of the Federal Constitution was first raised in a motion for a new trial submitted to the Mahoning County Court of Common Pleas. App., *infra,* 48a. The motion was submitted, argued and ruled upon prior to Petitioner's direct appeal, and the claim was asserted as a ground for relief in Petitioner's first appeal of right to the Ohio Court of Appeals, Seventh Appellate District. App., *infra,* 48a. Petitioner raised the claim again in his request for discretionary review in the Supreme Court of Ohio; review of the claim was denied. App., *infra,* 6a. Petitioner subsequently asserted this claim in the United States District Court for the Northern District of Ohio as a basis for habeas corpus relief; the District Court rejected the claim. App., *infra,* 21a-22a. The denial of relief was reviewed on the merits by the United States Court of Appeals for the Sixth Circuit, which affirmed the ruling of the District Court. App., *infra,* 8a-9a. Petitioner requested rehearing and

rehearing en banc, which the Sixth Circuit denied. App., *infra,* 1a-2a.

Petitioner was represented at trial by attorney Lou D'Apolito. App., *infra,* 4a-5a. D'Apolito and his cousin, David D'Apolito, operated a law practice in Youngstown, Ohio. App., *infra,* 4a-5a. For the sake of clarity, Petitioner will refer to Lou D'Apolito and David D'Apolito by their full names throughout this pleading. David D'Apolito had previously represented an individual named Joseph Veneroso; Veneroso was a key prosecution witness at Petitioner's criminal trial. App., *infra,* 4a-5a. Veneroso had been a public employee during Petitioner's term of office as a County Commissioner. App., *infra,* 4a-5a.

At trial, the prosecution alleged that Petitioner had ordered Veneroso and another individual to perform private work during hours when they were being paid as public employees; these allegations were the underlying basis for the charges of theft in office. App., *infra,* 4a and 43a. As a result, the testimony of Veneroso was indispensable to the state's case because Veneroso was an active participant in the purported wrongdoing and a first-hand witness to the alleged criminal activity. App., *infra,* 4a and 43a.

The prior representation of Veneroso by David D'Apolito related to criminal charges which had resulted from Veneroso's attempt to bribe to a state employee. App., *infra,* 4a-5a. Veneroso offered to pay his supervisor $6000 in exchange for the questions that would appear on an upcoming state-administered licensing examination; however, the supervisor secretly recorded the attempted bribe, and criminal charges were brought against Veneroso. App., *infra,* 4a-5a. David D'Apolito obtained a plea agreement for Veneroso

which resulted in a conviction for the lesser offense of falsification. App., *infra,* 4a.

Impeaching Veneroso's integrity and honesty was obviously indispensable to Petitioner's defense. Whether Petitioner would be acquitted or convicted of theft in office depended entirely upon whether or not the jury believed that Veneroso was being truthful. Petitioner's trial counsel had a clear obligation to inform the jury that Veneroso had attempted to bribe a state employee for the purpose of cheating on an examination; such unqualifiedly dishonest conduct is a textbook example of impeachment material.

Petitioner's trial attorney failed to impeach Veneroso, and did not attempt to inform the jury of Veneroso's attempted bribery and cheating. App., *infra,* 4a-5a. Instead, Petitioner's trial attorney merely disclosed that Veneroso had been convicted of falsification; no details of the conduct which led to the conviction were presented to the jury. App., *infra,* 5a. Lou D'Apolito possessed irrefutable evidence that Veneroso was a liar and a cheat, but he nevertheless failed to present this evidence at trial. This failure to impeach Veneroso resulted from one cause and one cause alone: Lou D'Apolito had a conflict of interest which resulted from the prior representation of Veneroso by his law firm.

A vigorous cross-examination by Lou D'Apolito concerning Veneroso's dishonest conduct would have carried a very real threat of disciplinary sanctions. The constraints imposed on Lou D'Apolito by the disciplinary rules prohibited him from informing the jury of the facts giving rise to Veneroso's conviction for falsification. If Lou D'Apolito had cross-examined Veneroso regarding the bribery, the cross-examination would have constituted a prima facie violation of the Ohio Code of Professional Responsibility: under the Ohio

Disciplinary Rules, "a lawyer's conflict of interest is imputed to his law firm." *State v. Lentz*, 639 N.E.2d 784, 786 (Ohio 1994). Furthermore, at the time of Petitioner's criminal trial, Ohio law mandated a presumption that members of the same law firm had shared client confidences. *Kala v. Aluminum Smelting*, 688 N.E.2d 258, 262-63 (Ohio 1998). Because David D'Apolito had represented Veneroso in criminal proceedings, Lou D'Apolito would be presumed to have knowledge of confidential information relating to Veneroso. *See Id.*

Ohio law prohibits an attorney from using the confidences of a former client to benefit a current client. *Geauga County Bar Association v. Psenicka*, 577 N.E.2d 1074, 1074-75 (Ohio 1991), citing DR 4-101 and 5-105. *See also*, Ohio Code of Professional Responsibility, Cannon Four, EC 4-6. Had Lou D'Apolito cross-examined Veneroso about the attempted bribery, the law would presume that he had done so with knowledge of Veneroso's secrets and confidences. *See Kala, supra.* Under such circumstances, a lawyer can be subject to discipline because the confidential information acquired from the former client will influence the representation of the current client. *Psenicka, supra* at 1075. Even if Petitioner's trial attorney had no actual knowledge of Veneroso's confidential information, a conflict of interest would still be present because the threat of a disciplinary investigation constitutes an obvious deterrent, regardless of what results an investigation might have yielded.

The record demonstrates conclusively that Lou D'Apolito had a conflict of interest in this case. The key prosecution witness for the government was a former client of Lou D'Apolito's law firm. As a result of the former representation, Lou D'Apolito's cross-examination was limited and the jury was not informed of crucial impeachment

evidence. An "actual conflict of interest" within the meaning of *Cuyler v. Sullivan* could hardly be more pronounced than the one which was present in this case. Petitioner is accordingly entitled to habeas corpus relief.

II. Statement relating to Petitioner's claim of juror bias.

Petitioner's claim that his right under the Federal Constitution to an impartial jury was violated was first raised in an application to reopen his direct appeal pursuant to Ohio Rule of Appellate Procedure 26 on the grounds of ineffective assistance of appellate counsel. App., *infra,* 26a-27a. The Ohio Court of Appeals refused to reopen the appeal. App., *infra,* 26a-27a. Petitioner sought discretionary review of this claim in the Supreme Court of Ohio; the Court declined to hear the claim. App., *infra,* 7a. Petitioner subsequently asserted this claim in the United States District Court for the Northern District of Ohio as a basis for habeas corpus relief; the District Court rejected the claim on the ground of procedural default. App., *infra,* 21a-22a. The denial of relief was reviewed by the United States Court of Appeals for the Sixth Circuit, which affirmed the ruling of the District Court. App., *infra,* 9a-12a. Petitioner requested rehearing and rehearing en banc, which the Sixth Circuit denied. App., *infra,* 1a-2a.

The Federal Constitution prohibits a trial by jurors who "...before they hear the testimony, have deliberately formed and delivered an opinion that the person whom they are to try is guilty or innocent of the charge alleged against him." *United States v. Burr,* 25 F.Cas. 49, 50 (1807) (Marshall, C.J., sitting as Circuit Justice). A trial by jurors who hold fixed and preconceived notions of guilt violates the Fourteenth Amendment. *See generally Irvin v. Dowd,* 366 U.S. 717 (1960). The presence of even a single biased juror constitutes

a basis for habeas corpus relief. *(Michael) Williams v. Taylor*, 529 U.S. 420, 422 (2000).

In this case, after the jury had been impaneled, Petitioner's trial attorney received a phone call from an individual identifying herself as a member of the venire. App., *infra,* 5a-6a. The individual informed trial counsel that an impaneled juror had referred to Petitioner by stating "That guy is guilty." App., *infra,* 5a-6a. The statement was made prior to the presentation of any evidence. App., *infra,* 5a. Although the caller did not wish to identify herself, she identified the juror who made the statement, as well as another member of the venire who had heard the statement being made. App., *infra,* 5a-6a.

Trial counsel appeared on the record and asked the Court to conduct an inquiry into the allegations. App., *infra,* 6a. The prosecution actively interfered with Petitioner's right to an impartial jury by opposing any investigation of the claims, asserting that any questioning might operate to prejudice the juror against the state's case. App., *infra,* 6a. The Court rejected Petitioner's request and refused to conduct any inquiry. App., *infra,* 6a. Counsel for Petitioner entered an objection on the record. App., *infra,* 13a.

The failure to conduct an inquiry into the allegation of juror bias clearly violated Petitioner's Sixth Amendment rights as incorporated by the Due Process Clause of the Fourteenth Amendment. The juror in question is alleged to have referred to Petitioner by stating "That guy is guilty." App., *infra,* 5a-6a. If such a mindset does not constitute a fixed opinion of guilt within the meaning of *Irvin v. Dowd,* nothing does. When presented with a colorable allegation of juror bias, a trial court must afford a defendant some type of meaningful inquiry. *Smith v. Phillips*, 455 U.S. 209, 215

(1982). In this case, the Trial Court refused to protect Petitioner's Sixth Amendment rights. Habeas corpus relief is therefore warranted.

III. Statement relating to Petitioner's claim of cause and prejudice as to the allegation of procedural default.

In this case, Petitioner is claiming ineffective assistance of appellate counsel in violation of the Federal Constitution as cause and prejudice for the procedural default of his juror bias claim. Petitioner's claim that appellate counsel had been constitutionally deficient was first raised in an application to reopen his direct appeal pursuant to Ohio Rule of Appellate Procedure 26. App., *infra,* 26a-27a. The Ohio Court of Appeals refused to reopen the appeal. App., *infra,* 26a-27a. Petitioner sought discretionary review of this claim in the Supreme Court of Ohio; the Court declined to hear the claim. App., *infra,* 7a. Petitioner subsequently asserted this claim in the United States District Court for the Northern District of Ohio as cause and prejudice to cure the procedural default of his juror bias claim; the District Court concluded that the procedural default was enforceable. App., *infra,* 21a-22a. Petitioner's assertion of cause and prejudice was reviewed by the United States Court of Appeals for the Sixth Circuit, which affirmed the ruling of the District Court. App., *infra,* 10a-12a. Petitioner requested rehearing and rehearing en banc, which the Sixth Circuit denied. App., *infra,* 1a-2a.

Following trial, Petitioner retained new representation for the purpose of moving for a new trial based pursuant *Cuyler v. Sullivan,* as well as for taking a direct appeal from his convictions. App., *infra,* 6a. As stated previously, Petitioner's trial counsel had raised a clearly meritorious objection on the record in response to the allegation of juror bias. Appellate counsel failed to raise the issue on direct

appeal, electing instead to devote their efforts to several claims which were patently frivolous. App., *infra,* 18a-19a and 30a-38a.

No competent attorney in the State of Ohio or anywhere else could conclude that failing to raise the issue of juror bias in Petitioner's direct appeal would constitute a legitimate tactical decision. An objection had been preserved on the record, and the underlying error was in direct conflict with the holding of this Court in *Smith v. Phillips, supra.* If that were not enough, the constitutional violation in question would not have been subject to harmless error review. *See Gomez v. United States*, 490 U.S. 858, 876 (1989), quoting *Gray v. Mississippi*, 481 U.S. 648 (1987). *See also (Michael) Williams v. Taylor, supra,* on remand as *Williams v. Netherland*, 181 F.Supp.2d 604, 617 (E.D.Va. 2002).

In response to appellate counsel's blatant ineffectiveness, Petitioner moved to reopen his appeal pursuant to Ohio Rule of Appellate Procedure 26. App., *infra,* 26a-27a. Rule 26 provides a procedural vehicle for bringing constitutional claims based on appellate counsel's inadequacy. *See, e.g., Edwards v. Carpenter*, 529 U.S. 446 (2000). The Ohio Court of Appeals did not address the issue of deficient performance, instead concluding that Petitioner had not been prejudiced because he would not have been entitled to relief even if the error had been raised. App., *infra,* 26a-27a.

The Sixth Circuit concluded that Petitioner had procedurally defaulted his claim of juror bias. App., *infra,* 10a-12a. The Sixth Circuit found that the Ohio Court of Appeals had correctly identified *Strickland v. Washington* as the controlling standard for claims of ineffective assistance of appellate counsel, and that the "unreasonable application" clause of § 2254 represented the correct standard of review.

App., *infra,* 10a-12a. The Sixth Circuit further found that the Ohio Court of Appeals had not rendered an objectively unreasonable decision, and accordingly denied relief. App., *infra,* 12a. The dissent disagreed, finding that the decision of the Ohio Court of Appeals that Petitioner had not been prejudiced was objectively unreasonable, and that the underlying constitutional error warranted habeas corpus relief. App., *infra,* 12a-20a. As explained below in Section III of Petitioner's reasons in support of certiorari, neither the majority nor the dissent in Petitioner's case before the Sixth Circuit applied the correct legal framework in considering the issue of procedural default; review by this Court is accordingly warranted.

REASONS FOR GRANTING THE WRIT

I. Certiorari is warranted and necessary to resolve a split of authority among the Circuit Courts of Appeal regarding the applicability of *Cuyler v. Sullivan*, 446 U.S. 355 (1980) in federal habeas corpus proceedings.

In *Cuyler v. Sullivan,* 446 U.S. 355 (1980), this Court addressed the applicability of the Sixth and Fourteenth Amendments to claims of ineffective assistance of counsel predicated upon attorney conflicts of interest; under *Sullivan*, a defendant must be granted relief if a conflict of interest had an adverse effect on the performance of his or her attorney. In *Mickens v. Taylor*, 535 U.S. 162 (2002), the Court indicated that the applicability of *Sullivan* to attorney conflicts arising from successive representation may not qualify as "clearly established federal law" within the meaning of 28 U.S.C. § 2254. 535 U.S. at 176.

Following *Mickens,* the Federal Circuits have reached differing conclusions as to the reach of *Sullivan's* applicability

in § 2254 proceedings. In Petitioner's case, the Sixth Circuit held that *Sullivan* applies only to joint representation (defined as "simultaneous trial of co-defendants") and to multiple representation (defined as "co-defendants at severed trials"). App., *infra,* 8a-9a. The Sixth Circuit expressly held that *Sullivan* "...is inapplicable to cases of successive representation." App., *infra,* 8a.

In contrast, the Fourth Circuit has held that the applicability of *Sullivan* is not limited to attorney conflicts arising from joint and/or multiple representation. *See generally Rubin v. Gee,* 292 F.3d 396 (4th Cir. 2002). In *Rubin,* pretrial defense counsel withheld their own exculpatory testimony from the defendant's criminal trial in order to protect their own penal and pecuniary interests. 292 F.3d at 402-04. The Fourth Circuit concluded that such conduct falls squarely within the holding of *Sullivan,* and that such circumstances mandate that habeas corpus relief be afforded to the defendant. *Id.* at 403-07. The Fourth Circuit expressly noted that *Mickens* had addressed the potential limits on the reach of *Sullivan;* however, the majority in *Rubin* found that the clearly established precedent of this Court mandated the application of *Sullivan* to the facts before it. *Id.* at 402, FN 2; *accord Mickens,* 535 U.S. at 184, FN 8 (Stevens, J., dissenting) (explaining that the application of *Sullivan* can sometimes be required in cases dealing with "...insidious conflicts arising from a lawyer's self-interest.").

Moreover, the Fourth Circuit committed no error in applying *Sullivan* to the conduct of counsel who did not appear at the defendant's trial; the decisions of this Court in *Burden v. Zant I,* 498 U.S. 433 (1991) and *Burden v. Zant II,* 510 U.S. 132 (1994) establish conclusively that pretrial deficiencies in representation can necessitate the application of the *Sullivan* prophylaxis, even if the defendant is

represented by a different attorney at trial. The holding of the Sixth Circuit that *Sullivan* is limited to the conflicts arising from the joint or severed trials of mutually indicted codefendants is wholly incompatible with the binding authority of this Court, and the decision of the Fourth Circuit in *Rubin* provides a contemporary example of why such a limitation in the applicability of the *Sullivan* standard is entirely inadequate to protect the guarantees provided by the Sixth Amendment.

The decision of the Sixth Circuit in Petitioner's case also conflicts with the precedent of the Ninth Circuit. *Belmontes v. Woodford*, 350 F.3d 861, 882-87 (9th Cir. 2003), *vacated and remanded on other grounds, Brown v. Belmontes*, U.S. No. 03-1503 (Order List March 28, 2005), involved a successive conflict based on the prior unrelated representation of a mutually-indicted codefendant who had entered a guilty plea prior to trial. 350 F.3d at 869, 882-86. The petitioner's attorney was a member of a law firm that had previously represented the codefendant; in addition, following trial the petitioner discovered that his attorney had personally represented the codefendant while working as a public defender. *Id.* at 883.

In *Belmontes,* the government argued that the decision of this Court in *Mickens* precluded the application of *Sullivan* to conflicts arising from successive representation. *Id.* at 884. The Ninth Circuit rejected this claim, explaining that "In this circuit, it was well-established at the time that Belomontes' conviction became final that conflicts of constitutional magnitude can arise from cases of successive representation." *Id.* at 884 (citations omitted). However, the Ninth Circuit concluded that even though the petitioner's case was subject to adjudication under the *Sullivan* standard, habeas corpus

relief was not warranted because the conflict did not have an adverse effect on his attorney's performance. *Id.* at 885-86.

Certiorari is clearly warranted in this case based on the divergent conclusions of the Circuit Courts of Appeal with regard to the applicability of *Cuyler v. Sullivan*. In Petitioner's case, the Sixth Circuit held that *Sullivan* is only implicated where a conflict relates to the joint or severed trials of mutually indicted codefendants. App., *infra,* 8a-9a. In contrast, the Fourth Circuit has applied *Sullivan* to a conflict which did not involve a codefendant and which was not caused by the defendant's trial attorney. *Rubin v. Gee, supra*. Similarly, the Ninth Circuit has held that *Sullivan* is applicable to conflicts arising from successive representation. *Belmontes v. Woodford, supra.* Accordingly, Petitioner respectfully submits that granting certiorari in this case would be appropriate.

II. Certiorari is warranted because the decision of the Sixth Circuit denying habeas corpus relief on the ground of juror bias is in direct conflict with the binding authority of this Court.

As explained previously, the Ohio Court of Appeals held that Petitioner could not establish that his appellate counsel had been ineffective; the Court held that Petitioner had not been prejudiced because, even if his juror bias claim had been considered on the merits, he would not have been entitled to relief. App., *infra,* 26a-27a.

The decision of the Ohio Court of Appeals in this regard simply cannot be reconciled with the binding precedent of this Court. As recognized by the dissent in Petitioner's appeal before the Sixth Circuit, a colorable claim of juror bias must be investigated pursuant to *Smith v. Phillips, supra*. App.,

infra, 15a. The facts of Petitioner's case clearly presented a colorable claim of juror bias. The alleged problem juror was specifically identified, as was another member of the venire who could corroborate the statement. App., *infra,* 5a-6a. Moreover, there is nothing a juror could say which would be more indicative of bias than "That guy is guilty." The decisions of the Ohio Court of Appeals and the Sixth Circuit are in clear conflict with the binding authority of this Court. Certiorari is accordingly warranted.

III. Certiorari is warranted because the decision of the Sixth Circuit concluding that Petitioner's claim of juror bias had been procedurally defaulted conflicts with the precedent of this Court.

Finally, the cause and prejudice analysis conducted by the Sixth Circuit conflicts with the precedent of this Court. The Sixth Circuit concluded that the "unreasonable application" clause governed review of the Ohio Court of Appeals' rejection of Petitioner's claim of ineffective assistance of appellate counsel. App., *infra,* 11a-12a. The Sixth Circuit held that the Ohio Court of Appeals had correctly identified *Strickland v. Washington* as the controlling legal standard; as a result, the less-stringent standards of review under the "contrary to" clause were inapplicable. App., *infra,* 11a-12a.

The Sixth Circuit's utilization of the "unreasonable application" cause was error. Although the Ohio Court of Appeals correctly identified *Strickland* as the controlling standard, the Sixth Circuit was clearly required to consider the implicit adjudication of the underlying constitutional violation in determining whether the "contrary to" or "unreasonable application" clause controlled the inquiry; any other conclusion would permit a State to shield a patently unconstitutional holding behind the otherwise-unobjectionable

rejection of a *Strickland* claim. Because the Ohio Court of Appeals necessarily violated the rule of *Smith v. Phillips* in rejecting Petitioner's claim of ineffective assistance of appellate counsel, the less-rigorous standards of review available under the "contrary to" clause should have been controlling. *See, e.g., Williams v. Taylor,* 529 U.S. at 405-06 (O'Connor, J., writing for the majority).

Furthermore, at the time of Petitioner's appeal, a separate panel of the Sixth Circuit had recognized that that even where a state court has properly identified *Strickland* as the controlling standard of review for claims of ineffective assistance of appellate counsel, the "contrary to" clause will still apply if the state court denial of the *Strickland* claim was necessarily predicated upon an impermissible rejection of the underlying constitutional violation. *See Joshua v. Dewitt*, 341 F.3d 430 (6th Cir. 2003).

In *Joshua*, the petitioner asserted that he had been denied the effective assistance of counsel at both the trial and appellate levels based on counsel's failure to raise a clearly meritorious Fourth Amendment claim. 341 F.3d at 441-45. The Sixth Circuit concluded that even though the Ohio Court of Appeals had correctly identified *Strickland* as the controlling rule of law, the rejection of the petitioner's *Strickland* claim necessarily required a finding that the underlying Fourth Amendment claim lacked merit. *Id.* Review under the "contrary to" clause was therefore available, and habeas corpus relief was granted. *Id.* The Sixth Circuit nevertheless failed to apply this principle to Petitioner's case, even though the decision of the Ohio Court of Appeals rejecting Petitioner's claim of ineffective assistance of appellate counsel is necessarily incompatible with the requirements of *Smith v. Phillips, supra.* App., *infra,* 11a-12a. Certiorari is accordingly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Dated: April 1, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02-4273

[Filed January 6, 2005]

FRANK LORDI, Petitioner-Appellant,	)
v.	)
TODD ISHEE, WARDEN, Respondent-Appellee.	)

BEFORE: SILER, MOORE, and BALDOCK,* Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the

* Hon. Bobby R. Baldock, Senior United States Circuit Judge for the Tenth Circuit Court of Appeals, sitting by designation.

original panel members but also to all other active** judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

** Judge Cook recused herself from participation in this ruling.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02-4273

[Filed September 10, 2004]

Frank Lordi, Petitioner-Appellant,
v.
Todd Ishee, Warden, Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland
No. 01-01725. Donald C. Nugent, District Judge

Before: SILER, MOORE, and BALDOCK, Circuit Judges.*

* The Honorable Bobby R. Baldock, Circuit Judge of the United States Court of Appeals for the Tenth Circuit, sitting by designation.

OPINION

SILER, Circuit Judge. Frank Lordi appeals the district court's denial of his petition for a writ of habeas corpus from his convictions in state court under 28 U.S.C. § 2254. In the district court, Lordi claimed various constitutional deficiencies in his convictions. However, this court granted Lordi a certificate of appealability solely on the issues of whether his trial counsel was constitutionally ineffective due to a conflict of interest, and whether Lordi was constitutionally deprived of an impartial jury due to the trial court's decision not to investigate an allegation of a juror's bias. For the reasons stated hereafter, the district court is **AFFIRMED**.

BACKGROUND

In April 1998, Lordi was indicted on eighteen criminal counts, variously stemming from his position as a county commissioner in Mahoning County, Ohio. Lordi hired attorney Lou D'Apolito (D'Apolito) to defend against the charges. D'Apolito's law partner, David D'Apolito, had previously represented one of the government's material witnesses against Lordi, Joseph Veneroso. This representation had been in a previous unrelated criminal case involving a felony charge of bribery. Veneroso had worked in the county's building inspection office and had offered to pay his supervisor $6,000 for the answers to a required certification test. In 1996, in exchange for Veneroso's guilty plea, the charge was reduced to a misdemeanor of falsification. At Lordi's trial, the government intended to have Veneroso testify in regard to how Lordi would direct Veneroso to engage in personal (e.g., maintenance on Lordi's rental houses) and political (e.g., gathering petitions) chores while he was being paid by the county.

D'Apolito initially questioned his ability to defend Lordi due to his partner's prior representation of Veneroso, and informed Lordi that he had a potential conflict of interest. However, after conducting some research into the conflict issue, D'Apolito concluded that he would be able to defend Lordi. D'Apolito shared this research and his conclusion with both the original prosecutor and the replacement prosecutor, who initially warned D'Apolito that he thought it was necessary to seek his removal from the case due to the potential conflict until D'Apolito shared his research with him. Off the record before trial, D'Apolito and the prosecutor, without Lordi present, brought the prior representation of Veneroso to the attention of the trial court, which was dismissive of the entire issue. The parties and court intended to put the issue on the record when a court reporter was available, but never did.

During cross-examination of Veneroso at trial, D'Apolito brought out Veneroso's conviction for falsification, but otherwise did not go into any details of the offense. The cross-examination was relatively friendly with D'Apolito accepting several re-characterizations of his questions by Veneroso. Ultimately, on February 24, 1999, Lordi was convicted on four counts, including theft in office (O.R.C. § 2921.42(A)(2)), unlawful interest in a public contract (O.R.C. § 2921.42(A)(1)), and two misdemeanor counts of having a conflict of interest (O.R.C. § 102.03(E)). All the counts on which Lordi was convicted either did not rely on Veneroso's testimony, or had other witnesses who corroborated Veneroso's testimony.

Additionally, after jury selection but before trial, D'Apolito received an anonymous telephone call from a female who claimed to have been a member of the venire. The caller alleged that she overheard an impaneled juror make

the statement "that guy is guilty" while looking over at Lordi. The caller refused to identify herself, but claimed that another member of the venire, whom she named, had also overheard the comment as they had discussed it between themselves. D'Apolito brought this to the immediate attention of the trial court and requested that the court inquire into the truth or falsity of the allegation. The state opposed this inquiry on the basis that there was no indicia of reliability as to the accusation and it had the potential of tilting the accused juror into a pro-defense mode to compensate against the accusation that he was biased against Lordi. The trial court refused to conduct additional inquiry, citing the fact that the call was anonymous and that the court had no reason to suspect that anyone sitting in the venire would have heard it. Additionally, the court speculated that the comment could have been made in jest, and agreed with the prosecution that an inquiry would potentially tilt the juror into a pro-defense mode.

On May 26, 1999, Lordi filed a motion for a new trial on the basis of newly discovered evidence, citing his "discovery" of a conflict of interest in his trial counsel. After an evidentiary hearing, the motion was denied. The appeal of the motion's denial and Lordi's direct appeal were consolidated by the Ohio Court of Appeals, which affirmed the denial and Lordi's conviction in 2000. The Ohio appellate court ruled as to the conflict issue that "[t]here [was] nothing in the record to demonstrate that [Lordi's] counsel had an actual conflict of interest which prevented him from effectively representing" Lordi. *State v. Lordi*, 748 N.E.2d 566, 573, 140 Ohio App. 3d 561, 2000 Ohio 2582, 2000 Ohio 2590 (Ohio Ct. App. 2000). On May 23, 2001, the Ohio Supreme Court denied Lordi leave to appeal. A subsequent motion for reconsideration was denied. While pursuing the appeal to the Ohio Supreme Court, Lordi filed other applications for relief in the Ohio courts, which were variously denied and for

which he was ultimately denied leave to appeal by the Ohio Supreme Court on May 23, 2001.

On January 4, 2001, Lordi filed a motion to reopen his appeal with the Court of Appeals, alleging various claims that his appellate counsel was ineffective, including the failure of his appellant counsel to raise the issue of the trial court's failure to inquire into the juror bias issue. In February 2001, the motion was denied with the appellate court ruling in regard to the juror misconduct issue that "[t]he only evidence of such misconduct before the court was an anonymous call. As the record does not support a claim of juror misconduct other than this anonymous phone call, appellant has not demonstrated a reasonable likelihood that had appellate counsel raised this assignment of error, it would have been sustained." Lordi appealed this decision to the Ohio Supreme Court, which also denied this claim in its consolidated denial of Lordi's petition on May 23, 2001.

On July 17, 2001, Lordi filed for a writ of habeas corpus under 28 U.S.C. § 2254 in federal district court. The district court dismissed the petition and denied a certificate of appealability (COA). This court later granted a certificate of appealability on two issues: first, whether Lordi received constitutionally ineffective assistance of counsel due to a conflict of interest by his trial counsel; and second, whether he was denied his Sixth Amendment right to an impartial jury.

ANALYSIS

Standard of Review.

A district court's denial of a habeas corpus writ is reviewed de novo. *Gonzales v. Elo*, 233 F.3d 348, 352 (6th Cir. 2000). Because Lordi's convictions occurred in 1999, the

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies. *Lindh v. Murphy*, 521 U.S. 320, 336, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997). Under AEDPA, factual findings made by a state court are presumed correct unless the petitioner rebuts the presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). For Lordi to receive relief, this court must find that the Ohio court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) & (2). Lordi has not raised issues in regard to the factual determinations of the Ohio courts, but focuses his arguments upon whether the Ohio courts made a determination that was contrary to federal law, or was an unreasonable application of that law.

A. Conflict of Interest. Lordi's conflict of interest claim relates to a successive (previous unrelated representation of a co-defendant and/or trial witness) rather than a joint (simultaneous trial of co-defendants) or a multiple (co-defendants at severed trials) representation. The presumed prejudice standard for ineffectiveness claims based on a conflict of interest detailed in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), is inapplicable to cases of successive representations. *See McFarland v. Yukins*, 356 F.3d 688, 701(6th Cir. 2004); *Moss v. United States*, 323 F.3d 445, 460-61 (6th Cir. 2003). Therefore, Lordi's argument that the Ohio courts acted contrary to federal law by dismissing the ineffectiveness claim due to his failure to demonstrate any prejudice is not correct. *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), is the controlling authority for an ineffectiveness claim based on a conflict of interest for

a successive representation, which was the legal standard the Ohio courts identified.

Not only did the Ohio courts identify the appropriate standard, but they did not make an unreasonable application of the ineffectiveness rule from *Strickland*. After holding an evidentiary hearing, the Ohio courts found that "[t]here was nothing in the record to suggest that David D'Apolito's prior representation of Veneroso required Lou D'Apolito to disregard his duties to [Lordi]." More specifically, this record does not show that either Lou or David D'Apolito was in possession of any confidential information that may have implicated a conflict. Lordi's case before this court is based upon pure speculation that D'Apolito may have known something by implication from his law partner which may have influenced his decision-making at trial, although he can point to no evidence that a conflict existed or that any decision was influenced. The only pertinent facts that Lordi has presented to the courts are that D'Apolito's law firm represented a government witness in a prior unrelated matter and then cross-examined that witness at trial. Without more, this presents a case of a potential conflict of interest due to a successive representation that never ripened into an actual conflict. As such, the Ohio courts were not in error when they ruled on this constitutional issue.

B. Juror Bias. Lordi claims that he was deprived of an impartial jury in violation of the Sixth Amendment due to the trial court's refusal to inquire into a statement by a juror which potentially demonstrated a pre-conceived notion of Lordi's guilt. The district court found this claim to have been procedurally defaulted. The COA that was issued is addressed to the merits of the juror bias claim rather than the procedural default issue, which Lordi also raised in the district court in the guise of an ineffectiveness of appellate counsel claim.

Although it is a statutory requirement that a COA reference the specific issue to be addressed on its face, 28 U.S.C. § 2253(c)(3), a procedural issue that possibly bars addressing an underlying constitutional claim is an appropriate matter to be addressed under a COA. *See Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

For procedural default to occur, the state must show that 1) Lordi failed to comply with a state procedural rule; 2) the state courts actually enforced the state procedural rule; 3) the state procedural bar must be an adequate and independent state ground to foreclose federal review; and 4) Lordi must not have cause and actual prejudice to excuse his default. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). Lordi's own habeas petition concedes that his appellate counsel did not properly raise the juror bias issue on direct appeal. He is therefore barred from raising it in the Ohio courts because he had the previous opportunity to present it during his direct appeal, and failed to do so, thus waiving the issue under state procedural law, *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994), which is an adequate and independent state ground. *Id.* at 161. Furthermore, since Lordi is required to present this claim to the Ohio courts first to satisfy the exhaustion requirement, but is now effectively barred from doing so due to Ohio's procedural rule, the second requirement that the state courts actually enforced the procedural rule is fulfilled. *Coleman v. Thompson*, 501 U.S. 722, 735, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

Lordi attempts to avoid procedural default by characterizing the Ohio appellate court's disposition of his post-conviction ineffectiveness claim on the prejudice prong as being a ruling on the merits of the juror bias issue, which would permit this court to review it. This is not correct. By addressing the prejudice of an ineffectiveness claim a court

does not bind itself into ruling on the claim's underlying merits. *See Lott v. Coyle*, 261 F.3d 594, 612 (6th Cir. 2001). Therefore, to reach the underlying issue of juror bias, Lordi must first establish an equivalent constitutional deprivation that excuses his default by the ineffective assistance of his appellate defense counsel. *See Edwards v. Carpenter*, 529 U.S. 446, 450-51, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). However, this issue cannot be addressed in a vacuum since Ohio's courts have already rendered a ruling on the merits of the ineffective assistance of counsel claim upon which Lordi is relying to excuse his procedural default.

Therefore, based on the standard of review from the AEDPA, this claim is procedurally defaulted. The Ohio appellate court that addressed the issue concluded that since the only evidence presented to the trial judge was an anonymous phone allegation, Lordi could not demonstrate a "reasonable likelihood" that he would have received relief had his appellate counsel raised the issue. Furthermore, the allegation related to a statement by a juror that, standing alone, only indicated the possibility of a pre-conceived notion of guilt. The Supreme Court has stated that the idea "that the mere existence of [a] preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) (internal citations omitted).

Since the federal constitutional standard for the prejudice necessary to demonstrate the ineffectiveness of counsel, and thus to excuse a procedural default, is "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," where "[a] reasonable probability is a probability

sufficient to undermine confidence in the outcome," *Strickland*, 466 U.S. at 694, the Ohio appellate court identified the correct legal standard. As for the Ohio court's decision being an unreasonable application of this legal standard, the Supreme Court has found it necessary within the past year to reiterate that when a state court's application of governing federal law is challenged in a habeas petition, the decision must not only be shown to be erroneous, but objectively **unreasonable**. *See Middleton v. McNeil*, 541 U.S. 433, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004); *Yarborough v. Gentry*, 540 U.S. 1, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003) (*per curiam* opinions reversing appellate court panels which granted habeas corpus writs due to findings that state courts made unreasonable applications of federal ineffective assistance of counsel law). We do not find that the Ohio court's determination of this ineffectiveness of counsel claim was unreasonable. "Without more" than the *possibility* of a preconceived notion of guilt, our confidence in the outcome has not been undermined.

AFFIRMED.

DISSENTING IN PART

MOORE, Circuit Judge, dissenting in part. Because I believe that Lordi has demonstrated cause and prejudice to excuse the procedural default on his juror-bias claim, I respectfully dissent from the corresponding portion of the majority's opinion.

I.

After jury selection, defense counsel Lou D'Apolito received a telephone call from an anonymous woman claiming to be on the jury venire. The woman said that she and another

female venire member, whom she identified, overheard a male colleague who was later seated on the jury ("Juror A") comment before the trial began that Lordi "was guilty." She also expressed concerns that Juror A had lied during voir dire, and stated that she felt compelled to report the matter.

D'Apolito requested that the trial court conduct an in-camera hearing to examine Juror A for bias. The prosecution opposed the request, arguing that the accusation was not credible and could potentially taint the jury pool. Denying the request without a hearing, the trial court (1) noted that the call was anonymous; (2) suggested that the anonymous venire member would not have been within hearing range of Juror A when the alleged comment was made; and (3) speculated that Juror A's comment may have been in jest. D'Apolito entered his objection to the denial.

Appellate counsel failed to raise a juror-bias claim on direct appeal. Lordi first presented the claim in his delayed motion for reconsideration before the Ohio Court of Appeals, seeking to excuse his procedural default due to ineffective assistance of appellate counsel.[1] Noting the scant evidence in the record of juror bias, the state appellate court denied the claim, holding that Lordi "has not demonstrated a reasonable likelihood that had appellate counsel raised this assignment of error [on direct appeal], it would have been sustained." *Ohio v. Lordi*, Nos. 99CA62; 99CA247, slip op. at 1 (Ohio Ct.

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[1] Ohio law requires defendants to raise a claim of ineffective assistance of appellate counsel on an application for reconsideration in the court of appeals or on direct appeal to the state supreme court. *See State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204, 1208 (Ohio 1992); Ohio App. R. 26(B).

App. Feb. 23, 2001), *appeal dismissed*, 747 N.E.2d 251, 21 Ohio St. 3d 1526 (Ohio 2001).

II.

To excuse the procedural default, Lordi contends that his counsel on direct appeal was constitutionally ineffective for failing to raise the juror-bias claim. *See, e.g., Seymour v. Walker*, 224 F.3d 542, 550 (6th Cir. 2000) ("If [petitioner] could show that she received ineffective assistance of appellate counsel that rose to the level of a violation of her Sixth Amendment rights, it would excuse her procedural default."). The applicable standard, enunciated in *Strickland v. Washington*, 466 U.S. 668, 690, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), requires a showing that (1) counsel's performance was so deficient as to be "outside the wide range of professionally competent assistance"; and (2) there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." The failure of appellate counsel "to raise an issue on appeal could only be ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal." *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004).

Because of the procedural arguments in this case, we must first decide whether there was a reasonable probability that the claim of juror bias would have prevailed on its merits at the time Lordi's appellate counsel failed to raise it. *Id.* If so, "we can then consider whether the claim's merit was so compelling that appellate counsel's failure to raise it amounted to ineffective assistance of appellate counsel that would excuse [Lordi's] procedural default." *Id.* at 700.

A.

"Under clearly established Supreme Court precedent, a defendant who alleges implied juror bias is entitled to a hearing in which he has 'the opportunity to prove actual bias.'" *Mason v. Mitchell*, 320 F.3d 604, 636 (6th Cir. 2003) (quoting *Smith v. Phillips*, 455 U.S. 209, 215, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)). "A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions." *Phillips*, 455 U.S. at 222 (O'Connor, J., concurring).

The Supreme Court has not dictated the type or breadth of opportunity that state trial courts must provide under *Phillips* to defendants raising allegations of juror bias. However, we have granted habeas relief where a state trial court categorically refused a defendant's request for any post-conviction hearing on the claim. *See, e.g., Nevers v. Killinger*, 169 F.3d 352, 373-74 (6th Cir.), *cert. denied*, 527 U.S. 1004, 119 S. Ct. 2340, 144 L. Ed. 2d 237 (1999). In *Nevers*, the defendant appended several jurors' affidavits to his motion for a new trial, stating that jurors were exposed to extraneous and potentially prejudicial information. We concluded that the trial court's denial of the defendant's request for a hearing and factual determination on the claim "prevented [him] from demonstrating with specificity that the extraneous information the jury possessed did in fact impair the ability of the jury to decide the case solely on the evidence properly presented to them"—a violation of the defendant's right to an impartial jury under the Sixth and Fourteenth Amendments. *Id.* at 374.

The Seventh Circuit recently reached a similar conclusion when juror bias allegations first arose at the start of trial in *Oswald v. Bertrand*, 374 F.3d 475 (7th Cir. 2004). Despite

considerable publicity of the murder in the small Wisconsin community, evidence that jurors were discussing the case before trial, and suggestions that at least one juror was willing to convict in order to expedite deliberations, the state trial court refused defendant's request to investigate juror bias and simply readmonished the jury. *Id.* at 479-80. Granting habeas relief, the Seventh Circuit held that a state trial court's inquiry into juror-bias allegations must be "reasonably calculated to resolve the doubts raised about the juror's impartiality" (internal quotation omitted), and should be increasingly more searching as the probability of bias increases. *Id.* at 480-81. The pretrial atmosphere and reported jury conduct "created a sufficiently high probability of jury bias to require on the part of the trial judge a diligent inquiry" to ensure the protection of the defendant's Sixth Amendment rights. *Id.* at 481.

While it is unnecessary for us to define the precise nature of the hearing required to be afforded to defendants raising juror-bias claims, the anonymous venire member's allegations were clearly sufficient to warrant some "diligent inquiry" by the trial court. *Oswald*, 374 F.3d at 481. First, the anonymous venire member levied a troubling allegation that Juror A lied during voir dire and that Juror A expressed his belief in Lordi's guilt. Second, she provided the name of a second woman on the venire who could substantiate her allegations, triggering a concern among reasonable jurists that Juror A's comments may have influenced other members of the jury pool. Third, the indictment and trial of a Mahoning County commissioner would naturally generate local publicity, placing the trial judge on notice about the potentiality for such prejudice.

The state trial court's response was constitutionally inadequate to protect Lordi's Sixth Amendment rights. No

factual support is cited for its conclusions that (1) the allegation was not credible due to the source's anonymity; (2) the anonymous venire member could not have overheard Juror A's comments; and (3) Juror A probably offered his comments in jest. These are just speculations of the state trial court. The state trial court further failed to recognize that the credibility of the allegation could be quickly ascertained by questioning the second venire member identified by the caller, and without necessarily interrogating—and potentially tainting—Juror A.

In light of the unambiguous command of the Supreme Court in *Phillips*, I believe it reasonably probable that a reviewing court on direct appeal, after recognizing the trial court's categorical failure to permit Lordi an opportunity to demonstrate the presence of actual juror bias, would have reversed the case and ordered relief. The Ohio Court of Appeals' contrary conclusion rested on an "unreasonable application" of *Strickland* because it incorrectly limited its prejudice inquiry to the merits of Lordi's juror-bias allegation. It found that even if a juror-bias claim had been offered on direct appeal, there was not "a reasonable likelihood that . . . it would have been sustained" because the claim was unsupported by evidence in the record. *Lordi*, slip op. at 1.[2] Of course, the reason for this lack of support can be

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[2] The full analysis of the Ohio Court of Appeals is as follows:

> Appellant first alleges that counsel should have raised the issue of the court's failure to conduct an inquiry into an allegation of juror misconduct. The only evidence of such misconduct before the court was an anonymous call. As the record does not support a claim of juror misconduct other than this anonymous call, appellant has not demonstrated a reasonable likelihood that had appellate counsel raised this

attributed to the state trial judge's complete abrogation of his constitutional duty to permit further inquiry or a hearing to develop the evidence. Hence, by omitting any mention of the trial court's inexplicable failure to conduct a hearing, the state appellate court did not consider the reasonable probability of reversal on direct appeal due to procedural error, and thus conducted an incomplete and unreasonable application of *Strickland*'s prejudice prong. *See Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000); *see also McFarland*, 356 F.3d at 699; *Lattimore v. Dubois*, 311 F.3d 46, 56 (1st Cir. 2002), *cert. denied*, 538 U.S. 966, 123 S. Ct. 1759, 155 L. Ed. 2d 521 (2003).

B.

Not only did the Ohio Court of Appeals unreasonably apply *Strickland*'s prejudice prong, but also that court failed to analyze *Strickland*'s deficient-performance prong. Consequently, our analysis of whether appellate counsel's omission of Lordi's juror-bias claim on direct appeal rises to the level of deficient performance under *Strickland* is conducted de novo. *Wiggins v. Smith*, 539 U.S. 510, 534, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (2003); *see also Maples v. Stegall*, 340 F.3d 433, 437 (6th Cir. 2003).

Lordi's juror-bias claim was so "significant and obvious" that appellate counsel's failure to raise it constitutes a

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assignment of error, it would have been sustained.

Lordi, slip op. at 1. While the opinion failed to cite to *Strickland* or conduct a meaningful constitutional analysis, our inquiry still proceeds under the deferential lens of 28 U.S.C. § 2254(d) because the state appellate court included some language that vaguely mirrors *Strickland*'s prejudice prong.

deficiency under *Strickland*. *Mapes v. Coyle*, 171 F.3d 408, 427 (6th Cir.), *cert. denied*, 528 U.S. 946, 120 S. Ct. 369, 145 L. Ed. 2d 284 (1999). As noted above, the Supreme Court, without qualification, "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Phillips*, 455 U.S. at 215. It naturally follows that the juror-bias issue was clearly stronger than the issues presented on direct appeal, mainly the forty-four alleged instances of prosecutorial misconduct—many of which were utterly frivolous or unsupported by the record. *Robbins*, 528 U.S. at 288 (requiring a habeas petitioner claiming ineffective assistance of counsel to demonstrate that "a particular nonfrivolous issue was clearly stronger than issues that counsel did present"). Moreover, D'Apolito's prompt objection to the trial court's refusal to conduct any inquiry into juror bias should have alerted appellate counsel of this claim, the Supreme Court's decisive language in *Phillips* forecloses any discretion of trial courts on whether or not to conduct an investigation into allegations of juror bias, and the record is totally devoid of any explanation of why appellate counsel would strategically fail to include the juror-bias claim. *Mapes*, 171 F.3d at 427.

Under these circumstances, the deficient-performance prong of *Strickland* has been satisfied. Given the clear Sixth Amendment violation, the decision of Lordi's appellate counsel to omit this issue on direct appeal was "an unreasonable one which only an incompetent attorney would adopt" and is appropriately cited as the cause for Lordi's failure to raise the issue on appeal. *Id.* at 428.

III.

Because the Ohio Court of Appeals unreasonably applied clearly established Supreme Court precedent when it held in effect that Lordi could not satisfy the prejudice prong of *Strickland* and because Lordi has shown deficient performance of appellate counsel, Lordi has overcome the procedural default. Because *Phillips* mandates that Lordi be provided with some meaningful opportunity to demonstrate actual juror bias after his allegations were presented to the state trial court, I would further hold that the state trial judge's failure to conduct *any inquiry* clearly violated Lordi's Sixth Amendment rights. Therefore, I would reverse the district court's decision to deny habeas relief, and I would remand with instructions to grant the writ unless the State of Ohio opts to retry Lordi within a reasonable period of time. I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 4:01 CV 1725

[Filed October 9, 2002]

FRANK LORDI, Petitioner	)
v.	)
TODD ISHEE, Warden, Respondent	)

Judge Donald C. Nugent

MEMORANDUM OPINION

This matter comes before the Court upon the Report and Recommendation of Magistrate Judge Vecchiarelli. The Report and Recommendation (Document #28) is ADOPTED by this Court, and Petitioner's Petition for Writ of Habeas Corpus is denied.

This case was referred to Magistrate Judge Vecchiarelli for a report and recommendation pursuant to 28 U.S.C.

§ 636(b)(1)(B) and Local Rule 72.2(a). Magistrate Judge Vecchiarelli found that Grounds One and Three of the petition are procedurally defaulted and the petitioner has failed to allege sufficient cause to overcome that bar. Grounds Two and Four of the petition are without merit; petitioner's trial counsel did not have a conflict of interest and did not render ineffective assistance, and his appellate counsel's failure to file a direct appeal on the basis of jury bias and prosecutorial misconduct was objectively reasonable and any such appeal would not have resulted in a reversal of petitioner's conviction.

Petitioner filed objections to the Magistrate Judge's Report and Recommendation on August 20, 2002. (ECF #34). The Court has reviewed the Report and Recommendation, including those portions to which objection has been made, *de novo*. *See Thomas v. Arn*, 474 U.S. 140 (1985): FED. R. CIV. P. 72(b). Further, it has considered all pleadings, affidavits, motions, and filings of the parties. The Court finds Magistrate Judge Vecchiarelli's Report and Recommendation to be well-written, well-supported, and correct. Therefore, the Report and Recommendation (Document # 28) is ADOPTED in its entirety. Accordingly, Mr. Lordi's Petition for Writ of Habeas Corpus is hereby DENIED.

Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); FED. R. APP. P. 22(b).

IT IS SO ORDERED.

/s/_____
DONALD C. NUGENT
United States District Judge

DATED: October 9, 2002

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 4:01 CV 1725

[Filed October 9, 2002]

FRANK LORDI,	)
Petitioner	)
	)
v.	)
	)
TODD ISHEE, Warden,	)
Respondent	)
	)

Judge Donald C. Nugent

JUDGMENT

Pursuant to this Court's Memorandum Opinion, the Report and Recommendation of Magistrate Judge Vecchiarelli (Document #28) is ADOPTED and Petitioner's Petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, is hereby DENIED.

Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be

taken in good faith, and there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); FED. R. APP. P. 22(b).

IT IS SO ORDERED.

/s/_____
DONALD C. NUGENT
United States District Judge

DATED: October 9, 2002

APPENDIX E

IN THE COURT OF APPEALS
FOR MAHONING COUNTY, OHIO
SEVENTH APPELLATE DISTRICT

No. 99CA62
99CA247

[Filed February 23, 2001]

STATE OF OHIO)
Plaintiff-Appellee)
)
v.)
)
FRANK LORDI)
Defendant-Appellant)
)

JUDGMENT ENTRY

Appellant has filed a motion to reopen his appeal pursuant to App. R. 26 (B), alleging five instances of ineffective assistance of appellate counsel. As appellant has not demonstrated that any of these alleged deficiencies prejudicially affected the outcome of the appeal, the application for reopening is denied.

Appellant first alleges that counsel should have raised the issue of the court's failure to conduct an inquiry into an

allegation of juror misconduct. The only evidence of such misconduct before the court was an anonymous call. As the record does not support a claim of juror misconduct other than this anonymous phone call, appellant has not demonstrated a reasonable likelihood that had appellate counsel raised this assignment of error, it would have been sustained.

Appellant next alleges three allegations of prosecutorial misconduct which counsel failed to raise in his direct appeal. We note that in his supplemental brief on the original appeal, counsel for appellant raised forty four (44) separate instances of prosecutorial misconduct. Appellant has not demonstrated that any of the comments by the prosecutor rose to the level of prosecutorial misconduct, which would have required reversal on appeal.

Appellant next argues that counsel was ineffective for failing to raise the issue of whether R.C. 2921.42, defining the crime of unlawful interest in a public contract, is unconstitutional as applied to appellant's case. This court held on direct appeal that appellant and his company had a direct interest in the Meander inn development project and that his conduct fell within the statutory definition of the crime. Appellant has not demonstrated a reasonable likelihood that had counsel raised this assignment of error on appeal we would have found the state unconstitutional as applied.

Appellant argues that counsel was ineffective for failing to raise ineffective assistance of trial counsel, as counsel failed to make a proffer to preserve error in the court's grant of a motion *in limine*. Because the record as presented to this court did not include a proffer of the evidence, this court would have been unable to determine on an ineffective assistance of

trial counsel claim that the result of the proceeding would have been different.

Finally, appellant claims that appellate counsel should have raised an assignment of error concerning the expert testimony of David Freel, which appellant argues implied that appellant was automatically guilty of the criminal offenses charged because he violated ethical rules. This claim is patently without merit. Mr. Freel's testimony did not imply that appellant was guilty of the criminal charges merely by virtue of violating ethical rules.

Appellant's motion to reopen is overruled.

IT IS SO ORDERED.

/s/_____

/s/_____

/s/_____

JUDGES

APPENDIX F

COURT OF APPEALS OF OHIO
SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

Case No. 99CA62, 99CA247

[Filed December 4, 2000]

STATE OF OHIO,
Plaintiff-Appellee

v.

FRANK LORDI,
Defendant-Appellant

PRIOR HISTORY
CHARACTER OF PROCEEDING
Criminal appeal from the
Mahoning County Common Pleas Court
Case No. 98CR295

JUDGES: Hon. Lawrence Grey, Retired, Hon. W. Scott Gwin, J., Hon. W. Don Reader, Retired (All sitting by Supreme Court Assignment)

OPINION

Reader, J.

This case is before this court following the partial grant of a motion for reconsideration filed by appellant Frank L. Lordi. We granted reconsideration solely as to the assignment of error raised in the supplemental brief of appellant, which was inadvertently omitted from the earlier opinion of this court. The statement of the facts underlying this appeal was included in the original opinion, and is incorporated herein. The sole assignment of error before this court on reconsideration is:

ASSIGNMENT OF ERROR

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS APPLIED TO THE STATE OF OHIO BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, GUARANTEES AN ACCUSED CERTAIN RIGHTS CALCULATED TO ENSURE HE OR SHE RECEIVES A FAIR TRIAL, ENUMERATED AS FOLLOWS: "IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY A RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHERE THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING

WITNESSES IN HIS FAVOR, AND TO HAVE THE EFFECTIVE ASSISTANCE OF COUNSEL."

Appellant alleges 44 separate instances of prosecutorial misconduct which he claims occurred during his trial. Appellant failed to object at trial to the issues he raises in his brief. Accordingly, we must find plain error in order to reverse. *State v. Long* (1978), 53 Ohio St. 2d 91, 372 N.E.2d 804. Plain error does not exist unless but for the error, the outcome of the trial clearly would have been otherwise. *State v. Nicholas* (1993), 66 Ohio St. 3d 431, 613 N.E.2d 225.

For ease of discussion we will group the 44 claims into categories, as the prosecutor did in his brief, and address each category together.

App. R. 16(A)(7) requires the appellant's brief to include an argument containing the contentions with respect to each assignment of error and the reasons in support of these contentions, with citations to the part of the record on which the appellant relies. App. R. 12(A)(2) provides that the court may disregard a claim of error if the party raising it fails to identify the error in the record, or fails to argue the assignments separately by brief. Items 3, 23, and 43, do not include citations to the record where appellant claims the improper conduct occurred. Item 1, found on page 5 of appellant's brief, includes a citation, but the quoted statement is not found on the page. Item 2 includes a question and answer, but appellant makes no argument as to why this question constituted prosecutorial misconduct. Accordingly, Items 1, 2, 3, 23, and 43 are not properly raised, and we will disregard the items.

Items 33, 34, 35, 36, 37, 38, 39, 40, and 42 all refer to questioning by appellant's counsel of a prosecution witness, on cross-examination. At a minimum, a claim of prosecutorial misconduct requires that the conduct be the prosecutor's conduct, not defense counsel's conduct. Similarly, Item 29 claims error in a ruling of the trial court, and does not properly raise a claim of prosecutorial misconduct.

The test for prosecutorial misconduct is whether the remarks are improper, and, if so, whether they prejudicially affected substantial rights of the accused. *State v. Lott* (1990), 51 Ohio St. 3d 160, 165, 555 N.E.2d 293, *cert. denied,* 498 U.S. 1017, 111 S. Ct. 591, 112 L. Ed. 2d 596. The prosecution is entitled to a certain degree of latitude in summation as to what the evidence has shown, and what reasonable inferences may be drawn therefrom. *Id.* The prosecutor must avoid insinuations and assertions calculated to mislead the jury, may not express his or her personal belief or opinion regarding the guilt of the accused, and may not allude to matters not supported by admissible evidence. 51 Ohio St. 3d at 166.

In Items 4, 9, 13, 17, 18, 19, 24-27, 31, 32, 41, 43, 44, appellant argues that the prosecutor misstated the law or the facts. We note that Items 4, 9, 13, 17 - 19, and 44, occurred during closing argument, during which time the prosecutor has wide latitude.

As to Items 4, 24, and 25, appellant argues that the prosecutor improperly stated that appellant could not wear two hats, "meaning that he could not vote on a public contract while he had a personal business interest in such contract." This is not a misstatement of the law, as R.C. 2921.42(A)(1) prohibits a public official from authorizing any public contract in which he has an interest. In Item 9, appellant generally

argues that the prosecutor made various misstatements of the jury instructions and evidence, which he does not specifically identify. Accordingly, appellant has not met his burden of demonstrating error. As to Item 13, appellant argues that the prosecutor improperly stated that Fred DeBonis was hired by appellant, when a majority vote of the county commissioners was required to hire DeBonis. This was a fair comment on the evidence, as Fred DeBonis testified that appellant's brother-in law told him to submit his job application directly to appellant, and DeBonis did in fact submit his application directly to appellant. As to Item 17, appellant objects to the prosecutor's statement that appellant viewed himself as "king of the county." While appellant is correct that this is factually incorrect, as appellant was not in fact the "king of Mahoning County", given the wide latitude accorded the prosecutor in closing argument, we find no prejudicial error.

In Item 18, appellant objects to the prosecutor's use of the county commissioner's general ethical handbook, as this handbook is merely a contract, and does not have the force of law. However, these statements were clearly identified as relating to the language of the commissioner's contract, and not the law. The trial court properly instructed the jury on the law according to the Ohio Revised Code, and appellant has not demonstrated prejudice. In Item 19, appellant claims that the prosecutor speculated on conversations, which were not supported by the evidence, concerning a change order. However, this comment related to counts 17 and 18 of the indictment, and appellant was not convicted on these counts. Appellant was therefore not prejudiced by this remark.

In Item 26, appellant claims that the prosecutor's statement in opening argument that appellant solicited business for ABC by saying, "don't forget about my brother," is misleading. This claim is without merit. The prosecutor

indicated that the evidence would show that appellant told Bill Kovass not to forget about his brother, and the action constituted solicitation. Kovass later testified that appellant told him not to forget about his brother for fire extinguishers. The State's description in opening statement accurately portrayed the evidence the state intended to present. In Item 27, appellant argues that the prosecutor improperly stated the facts when he said that ABC Fire Extinguishers are listed as "lined up" by the county, and the Meander Inn could not open without paying ABC. However, William Kovass later testified that he signed the security agreement with the county, including appellant's fire extinguishers, prior to getting loan money from Mahoning County. This was not a misstatement of the evidence the prosecution intended to present.

In Items 31 and 32, appellant argues that the prosecutor implied that appellant was not ethical by questioning David Freel, Executive Director of the Ohio Ethics Commission, concerning whether appellant ever requested opinions on ethical issues, or ever disclosed information concerning a potential conflict. Appellant has not demonstrated that the prosecutor committed any misconduct in the questioning of this witness. Appellant has not claimed error in the admission of the testimony of Freel.

As to Items 41 and 43, nothing in the record supports appellant's notion that there is a "first time offender rule" which would allow him to commit a crime but not be prosecuted. The issue of the one-time offender rule was raised by appellant during cross examination of Mr. Freel, and any further questioning of Mr. Freel concerning this alleged rule was therefore invited.

As to Item 44, the State was merely arguing that the signed contracts admitted into evidence were sufficient to

prove the State's case beyond a reasonable doubt. This was not an improper appeal to passion and prejudice, but rather was an argument concerning what the evidence had shown and what conclusions the jury may draw therefrom.

In Items 5, 6, 7, 8, 10, and 11, appellant argues that the prosecutor made improper and inflammatory statements in closing arguments. As to Item 5, the prosecutor stated in closing argument that appellant's pattern demonstrated that he did not give two cents for the ethics laws of the State. This was a fair comment, as appellant testified that he did not feel there was anything wrong with voting on a contract in which his company had an interest. Tr. 872. Items 6 and 7 refer to the prosecutor's argument concerning appellant's involvement in Democrats for Change, and the prosecutor's statement that the jury not let appellant get away with political patronage. These comments fell within the wide latitude given to the prosecutor in closing argument, as substantial evidence was presented concerning appellant's political activity in Democrats for Change.

In Item 8, appellant points to the prosecutor's question to the jury concerning why John Gillespie would lie. Appellant argues that the failure to ask the jury the same question as to DeBonis and Venerosa, all witnesses to the same count, raises issues of "obvious concern." Taken in context, the prosecutor was merely arguing that John Gillespie had no motivation to come into court and lie. We fail to see what issues of "obvious concern" are raised by the prosecutor's failure to ask the same question concerning other witnesses.

In Item 10, appellant argues the prosecutor improperly inferred that you cannot get elected in Mahoning County unless you are corrupt. The transcript page cited by appellant does not support this claim. In Item 11, appellant argues that

the prosecutor inferred that an investigation equated with guilt, as the prosecutor argued that the FBI and the Ohio Ethics Commission would not get involved if the charges were not true. Appellant has misquoted the prosecutor's statement. The prosecutor stated, "You think the FBI is going to get involved in all this malarkey. The FBI? The Ohio Ethics Commission? They're picking on him because Lordi has this attitude." Tr. 937 This was a fair comment on appellant's claim that the investigators were trying to stretch the law to put it around appellant's neck as a noose, and appellant's own testimony that the FBI was trying to intimidate him.

In Items 16, 20, and 21, appellant argues that the prosecutor made improper statements concerning his personal belief that appellant was guilty. In Item 16, the prosecutor stated that you cannot get elected in Mahoning County and "not be able to coerce an ant." Tr. 918. This was a fair rebuttal to argument by appellant's counsel, who stated that appellant could not coerce an ant. Tr. 279. As to Item 20, the prosecutor did not express his personal opinion, but rather stated that appellant is guilty, and the State had proved guilt beyond a reasonable doubt. The State is clearly permitted to tell the jury what verdict they are requesting. As to Item 21, the prosecutor stated, "I can assure you I don't want one conviction, I want 16 convictions because that defendant is guilty." Tr. 972. Again, this was a fair rebuttal to appellant's argument, in which counsel told the jury the prosecutor only wanted a finding of guilty as to one count, in order to justify the high cost of the prosecution.

Finally, appellant argues in Items 12, 14, 15, 22, 28, 30, that the prosecutor elicited inadmissible evidence. As to Items 12, 14, and 22, these items relate to the prosecutor's comment on car phone records, which appellant argues were

inadmissible. These car phone records were admissible as impeachment evidence, and had been clearly identified to the jury as related to violations of county policy. Regarding Item 15, appellant argues that the prosecutor tried to pass off Dale Lightbody as a credible witness. Appellant was acquitted of the coercion count, on which Lightbody testified, and therefore was not prejudiced. As to Item 28, appellant argues that the prosecutor mentioned that Venerosa had been convicted, but failed to mention that DeBonis was under indictment. Appellant has not demonstrated misconduct. Finally, as to Item 30, the question regarding the suspension of special investigator Terry Payor was in response to a comment by appellant's attorney in opening statement, where he stated that the lead investigator on the case had been investigated.

Appellant has not demonstrated that the prosecutor committed any misconduct, or that he was prejudiced thereby.

Appellant also argues that the court's ruling on the State's motion *in limine* violated his constitutional right to confront witnesses and to compulsory process. Appellant has failed to preserve this issue for appeal. The Ohio Supreme Court has held that after a motion *in limine* is granted, it is incumbent upon the defendant, who has been temporarily restricted from introducing evidence by virtue of a motion a motion *in limine,* to seek the introduction of evidence by proffer or otherwise, in order to enable the court to make a final determination as to its admissibility, and to preserve any objection on the record for purposes of appeal. E.g. *State v. Grubb (1986),* 28 Ohio St. 3d 199, 203, 503 N.E.2d 142. In the absence of such a proffer, the appellant has waived the issue for appeal. *Id.*

The assignment of error raised in appellant's supplemental brief is overruled. Upon reconsideration, we adhere to our prior opinion, and the judgment of the Mahoning County Common Pleas Court is affirmed.

READER, GWIN, and Grey, V. J., concur.

APPENDIX G

COURT OF APPEALS OF OHIO
SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

CASE NOS. 99 C.A. 62, 99 C.A. 247

[Filed October 20, 2000]

STATE OF OHIO,	)
PLAINTIFF-APPELLEE,	)
	)
v.	)
	)
FRANK LORDI,	)
DEFENDANT-APPELLANT.	)
	)

PRIOR HISTORY
CHARACTER OF PROCEEDINGS
Criminal Appeal from
Mahoning County Common Pleas Court
Case No. 98 CR 295

JUDGES: Hon. Lawrence Grey, Retired, Hon. W. Scott Gwin, J., Hon. W. Don Reader, Retired, (All sitting by Supreme Court Assignment)

OPINION

Reader, J.

Appellant Frank Lordi appeals a judgment of the Mahoning County Common Pleas Court convicting him of theft in office (R.C. 2921.41(A)(2)), unlawful interest in a public contract (RC 2921.42(A)(1)), and two counts of conflict of interest (RC 102.03(D),(E)):

ASSIGNMENTS OF ERROR

I. THE CONVICTION IN COUNT 4, UNLAWFUL INTEREST IN A PUBLIC CONTRACT AND THE CONVICTION IN 8, CONFLICT OF INTEREST, WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. COUNSEL FOR THE DEFENDANT PROVIDED DEFENDANT INEFFECTIVE ASSISTANCE IN CONNECTION WITH COUNSEL'S FAILURE TO REVEAL AND/OR AVOID A SERIOUS CONFLICT OF INTEREST THAT WAS INHERENT IN HIS REPRESENTATION OF FRANK LORDI; COUNSEL FOR DEFENDANT FAILED TO USE IMPORTANT IMPEACHMENT EVIDENCE THAT HE HAD ACCESS TO AND COUNSEL FOR THE DEFENDANT NEGLECTED TO REQUEST A MANDATORY JURY INSTRUCTION IN CONNECTION WITH ACCOMPLICE TESTIMONY.

Around 1997 or 1998, appellant purchased ABC Fire Extinguisher Company, and is the president of the company. Appellant also serves as a general partner in ABC Hood

Cleaning Company. Appellant's brother, Ronald Lordi, is an employee of ABC. Appellant was elected Mahoning County Commissioner in 1992, taking office in January, 1993. From 1993 through 1996, appellant served on the Issue 2 Committee on behalf of the county commissioners. This Committee votes on requests for road improvements from various municipalities within the county. All such contracts had to be approved by the county commissioners.

In 1994, William Kovass, a local businessman, sought to construct a hotel in Mahoning County. Kovass was a principal partner in Meander Inn, which already owned a Best Western Hotel, and wanted to construct a Hampton Inn on the adjacent property. In order to construct the new hotel, Meander Inn took out five development loans, including a $180,000 Community Development Block Grant (CDBG) administered by the Mahoning County Commissioners, and a $100,000 matching loan from the Mahoning County Revolving Loan Fund.

In his capacity as Mahoning County Commissioner, appellant signed an economic development agreement between Mahoning County and Meander Inn in September of 1996, authorizing disbursement of the $180,000 loan. Mahoning County took a security interest in various fixtures owned by Meander Inn to secure payment of the loan and construct the Hampton Inn. In his capacity as Mahoning County Commissioner, appellant also moved and voted for the resolution which approved the $100,000 matching loan for the development project.

In late 1994, or early 1995, Kovass went to the Mahoning County Commissioner's office to make a presentation to the commissioners in support of his application for a CDBG loan. Appellant was present at this meeting. Following the

presentation, appellant told Kovass "not to forget his brother for fire extinguishers." Kovass felt that appellant solicited him to purchase fire extinguishers from ABC. Kovass told appellant to contact his business manager, Janet Perry.

Thereafter, an ABC employee came to Janet Perry's office and asked to do some work. Appellant's brother sent a price quote to Ms. Perry on May 16, 1995. Meander Inn did in fact purchase fire extinguishers, related equipment, and services from ABC, beginning in December of 1995. The hotel opened in 1996.

On June 13, 1995, the Mahoning County Commissioners met at 10:00 a.m. to begin a luncheon tour at the Goshen Township Hall. The Goshen Township trustees had asked the commissioners to look over their records because they were in bad shape. The trustees wanted to see what could be done as far as repairing the roads. The township clerk was aware that appellant was the Issue 2 representative for the Mahoning County Commissioners. All three commissioners, including appellant, rode through the township in a mini-bus with various Goshen Township officials, viewing the roads in need of repair. The group discussed how to fix the roads, and looked to see if the commissioners could help the township.

When the trustees returned to the township garage, they proceeded to show the commissioners some of their equipment. The township clerk, Hilda Spack, stayed behind. Appellant stood and talked to Spack. Appellant saw their fire extinguisher, and asked who serviced the extinguisher. Appellant told Spack that if the contract ever came up, he would like a chance to bid on it. According to Ms. Spack, she felt that appellant was soliciting the contract.

In 1994, appellant was a member of Democrats for Change, a grassroots effort to change the leadership of the Democratic Party in Mahoning County. The group planned to unseat Don Hanni, the party chairman, and replace him with Mike Morley, by electing their own party precinct members. Appellant's role in Democrats for Change was as part of the recruiting process. He reviewed the precinct list, seeking to identify people in the community who would run for precinct person. Appellant would then telephone and interview these people.

Joseph Veneroso and Fred Debonis were two individuals who assisted the Democrats for Change. Veneroso worked for the Mahoning County Building Inspector from March of 1993 through May of 1996. Debonis worked for the building inspector from December 1993 through May of 1996, having been hired by appellant. Appellant directed both Veneroso and Debonis to pick up petitions for the Democrats for Change on county time, and to do whatever the people on the committee asked them to do. Appellant told them that if anyone questioned them, they should tell them to call appellant, and he would take care of the problem. When Debonis would mention to his boss that he and Veneroso needed to pick up petitions for Democrats for Change, his boss told the dispatcher not to give them any calls that day. Debonis and Veneroso used a county-owned vehicle to pick up the petitions.

John Gillespie was a runner for Democrats for Change during the same time. According to Gillespie, on one occasion, he was asked to pick up some petitions in an outlying area of the county. He refused, and had a physical confrontation with a committee member. Appellant was then called to find someone to pick up the petitions, because they

were "under the gun." Veneroso ultimately showed up at Democrats for Change with the required petitions.

On April 1, 1998, appellant was indicted on eighteen counts: arson, insurance fraud, two counts of theft in office, one count of coercion, seven counts of having an unlawful interest in a public contract, and six counts of conflict of interest. The charges of arson and insurance fraud were dismissed by the State because of insufficient evidence. The remaining charges were tried to a jury. The jury returned a verdict of guilty on one count of theft in office, one count of unlawful interest in a public contract, and two counts of conflict of interest. The jury found him not guilty of all other charges. Appellant was convicted in accordance with the jury's verdict.

I

Appellant argues that the judgment convicting him of unlawful interest in a contract, relating to the Meander Inn contract, and the judgment convicting him of conflict of interest, related to Goshen Township, are against the manifest weight of the evidence.

In considering a claim that a judgment is against the weight of the evidence, we must review the record, weigh the evidence and all reasonable inferences therefrom, consider the credibility of witnesses, and determine whether when resolving conflicts in the evidence the jury clearly lost its way. *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 387, 678 N.E.2d 541. The discretionary power to grant a new trial should be exercised only in the exceptional case when the evidence weighs heavily against conviction. *Id.*

Appellant was convicted of having an unlawful interest in a public contract:

> (A) No public official shall knowingly do any of the following: (1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

RC § 2921.42(A)(1).

Appellant argues that the grants to fund Meander Inn's economic development project did not constitute public contracts.

Public contract is defined:

> (1) "Public contract" means any of the following:
>
> > (a) The purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any of its political subdivisions or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either;
> >
> > (b) A contract for the design, construction, alteration, repair, or maintenance of any public property.

RC § 2929.42(G)(1)

The economic development agreement awarded Meander Inn a $180,000 Community Development Block Grant.

Resolution 95-1037, adopted by the county commissioners, awarded an additional $100,000 to be used to purchase specific real estate to construct an 82-room hotel. In addition, Meander Inn agreed to use its best efforts to create 29 new job opportunities in Mahoning County, including 22 permanent job opportunities that would be available to persons from low income households. Essentially, the Mahoning County Commissioners contracted with Meander Inn to provide economic developmental services to the county, in exchange for an award of $280,000 in discretionary grant funds. The county acquired the benefit of the development services provided by Meander Inn, which resulted in the construction of a new hotel and the creation of new jobs. The agreement between Meander Inn and the county was therefore a public contract as defined by R.C 2921.42(G).

Appellant also argues that he and his company did not have a direct interest in the project. However, but for the grants provided by the Mahoning County Commissioners, the hotel would not have been constructed, and ABC Fire Extinguisher Company would not have sold fire extinguishers, cases, and maintenance services to the hotel. Further, William Kovass testified that after he made his presentation to the commissioners in support of his application for a loan, appellant asked him not to forget his brother for fire extinguishers. Mr. Kovass testified that he felt that appellant solicited him to get the fire extinguishers from ABC. Subsequently, ABC Extinguishers sent a price quote to Meander Inn, and just six days before appellant moved and voted to approve the grant of revolving loan funds to Meander Inn, ABC began billing Meander Inn for inspections of the fire extinguishers and other services.

Further, a security agreement was incorporated into the economic development agreement, giving Mahoning County a security interest in the fixtures owned and to be acquired by the hotel, to secure payment of the loan. These fixtures, in which the county held a security interest, would include the fire extinguishers and the cases provided by appellant's company. Thus, when appellant signed the economic development agreement, he was taking a security interest on property provided and maintained by his own company.

Appellant was convicted of conflict of interest for his dealings with Goshen Township. RC 102.03(E) provides that no public official or employee shall solicit or accept anything of value that is of such character as to manifest substantial and improper influence upon the public official with respect to that person's duties.

Goshen Township had asked the commissioners to look over their roads because they were in bad shape, and to see if the county could help the township repair the roads. Hilda Spack, the township clerk, was aware that appellant was the Issue 2 representative for the Mahoning County Commissioners, and in this role, would vote on requests for road improvements from the township. After the tour, appellant examined the fire extinguisher in the township garage, and asked Spack who serviced the extinguishers. He noted that the contract expired in six months, and told Spack that if the contract ever came up, he would like a chance to bid on the contract. Although Spack did not have decision-making authority on the issue, Spack testified that she felt appellant solicited her for the contract. Although appellant ultimately did not bid on the contract, he solicited the contract at a meeting during which the township sought funds from a committee on which appellant had voting power. From the evidence, the jury could conclude that appellant's solicitation

of the extinguisher contract on that date implied that he would aid the township if he had an opportunity to receive the extinguisher contract. The jury's verdict was not against the manifest weight of the evidence.

The first assignment of error is overruled.

II

Appellant argues that his trial counsel was ineffective, because he had an impermissible conflict of interest that prohibited him from properly representing appellant on the theft in office charge, he failed to use particular evidence in an attempt to impeach certain witnesses, and he failed to request a jury instruction concerning the testimony of an accomplice.

Appellant raised the issue of ineffective assistance of counsel through a motion for new trial. Although a petition for post-conviction relief may provide a more effective and appropriate vehicle for the assertion of an ineffective assistance of counsel claim, a defendant may validly assert the denial of effective assistance of counsel as a basis for new trial pursuant to Crim. R. 33(A)(1) or (E)(5). *State v. Judy*, 1986 Ohio App. LEXIS 7683 (July 23, 1986), Hamilton App. No. C-850796, unreported. On appeal from an entry denying a motion for new trial, a reviewing court will not disturb the trial court's decision unless it determines that the trial court abused its discretion. *State v. Lane* (1976), 49 Ohio St. 2d 77, 358 N.E.2d 1081, *vacated on other grounds* (1978), 438 U.S. 911, 98 S. Ct. 3148, 57 L. Ed. 2d 1155.

Appellant first argues that counsel had a conflict of interest which prevented him from representing appellant on the theft in office charge. Appellant was represented at trial

by Lou D'Apolito. In an earlier case, Joseph Veneroso was represented David D'Apolito, cousin and law associate of appellant's trial counsel.

Where there is a right to counsel, the Sixth Amendment to the United States Constitution guarantees that representation shall be free from conflicts of interest. *State v. Dillon* (1995), 74 Ohio St. 3d 166, 167, 657 N.E.2d 273. Both defense counsel and the trial court are under an affirmative duty to insure that a defendant's representation is conflict free. *Id.* The trial court's duty arises when the court knows or reasonably should know a possible conflict of interest exists, or when the defendant objects to multiple representation. *State v. Manross* (1988), 40 Ohio St. 3d 180, 181, 532 N.E.2d 735 *cert. denied* (1989), 490 U.S. 1083, 109 S. Ct. 2106, 104 L. Ed. 2d 667. When this duty arises, the court is constitutionally required to conduct an inquiry into a possible conflict of interest. A lawyer represents conflicting interests when on behalf of one client, it is his duty to contend for something which his duty to another client requires him to oppose. 40 Ohio St. 3d at 182. A possibility of conflict exists when the interests of the defendant may diverge at some point so as to place the attorney under inconsistent duties. *Id.* If a question of conflict of interest arises after trial, the defendant must prove an actual conflict of interest, as opposed to a serious potential for conflict. *Id.* at syllabus.

Based on the evidence adduced at the hearing on the motion for new trial, the court concluded that Veneroso was indicted for bribery in July of 1996. In November of 1996, pursuant to a plea bargain, he pleaded guilty to falsification. The bribery indictment was dismissed. He was sentenced to six months of house arrest. In January of 1997, the sentence was modified to six months of non-reporting probation. There

is nothing in the record to show that Veneroso's plea bargain had anything to do with appellant's case. In fact, appellant was not indicted until two years after David D'Apolito's representation of Veneroso concluded. There is nothing in the record to demonstrate that counsel had an actual conflict of interest which prevented him from effectively representing appellant. In fact, on one of the theft in office charges for which Veneroso was the key witness, appellant was acquitted. While appellant claims that anything his attorney learned during the prior representation with Veneroso would have to remain secret, appellant has not indicated that counsel possessed any such information, which would have been helpful to his case. There is nothing in the record to suggest that David D'Apolito's prior representation of Veneroso required Lou D'Apolito to disregard his duties to appellant.

Appellant also claims that his counsel had a conflict of interest because Andy D'Apolito, counsel's uncle, was a former county building inspector who worked on appellant's rental properties along with Veneroso and Debonis. Appellant has demonstrated no actual conflict as a result of this connection. Further, appellant was acquitted of the theft in office charge for using Debonis and Veneroso to perform work on rental property he owned.

We next turn to appellant's claim that counsel was ineffective in his cross-examination of witnesses. Counsel is not ineffective unless his representation fell below an objective standard of reasonable representation, and the defendant was prejudiced by such representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674; *State v. Bradley* (1989), 42 Ohio St. 3d 136, 538 N.E.2d 373, *cert. denied,* 497 U.S. 1011, 110 S. Ct. 3258, 111 L. Ed. 2d 768. To show prejudice, the defendant must show that had counsel not erred, there is a reasonable

probability that the outcome of the trial would have been different. *Id.*

Appellant argues that counsel failed to adequately question John Gillespie regarding two statements given to the police. Appellant argues that initially Gillespie gave a statement that failed to mention appellant, but later gave a statement that implicated appellant.

At the new trial hearing, Attorney D'Apolito testified that Gillespie did not give two statements. Initially, Gillespie spoke to an investigator, who took some contemporaneous notes. Gillespie later gave a complete written statement, in which appellant was implicated. The court found that the signed and notarized statement did not conflict with the notes of the earlier interview, but merely added a paragraph in which appellant's name was mentioned. Appellant has not demonstrated that had counsel cross-examined Gillespie concerning his failure to mention appellant's name during the initial interview, he would have been acquitted. Appellant additionally argues that Gillespie felt pressured into making statements to the prosecutor. At best, the affidavit of Raymond Spisak claims that Gillespie felt threatened. There is nothing in the record to suggest that Gillespie's testimony was false or fabricated, or that cross-examination on this issue would have resulted in an acquittal.

Appellant also claims that counsel failed to use statements allegedly given by Janet Perry to the FBI, in which she stated that she purchased the fire extinguishers from ABC due to their price. During his examination of Perry, Attorney D'Apolito elicited from her that she selected ABC because she had problems with another company. She stated that there were no other reasons for the change in the fire extinguisher company. The appellant has not demonstrated prejudice from

the failure to question further on the issue of price. Janet Perry's testimony did not harm his trial position, as she provided an adequate explanation for her selection of ABC Company to provide fire extinguishers.

Finally, appellant argues that counsel was ineffective for failing to request a jury instruction on the testimony of an accomplice. The trial court specifically found that Debonis and Veneroso were not accomplices, and therefore this claim had no merit. At the very least, an accomplice must be a person indicted for the crime of complicity. *State v. Wickline* (1990), 50 Ohio St. 3d 114, 118, 552 N.E.2d 913, *cert. denied,* 498 U.S. 908, 111 S. Ct. 281, 112 L. Ed. 2d 235. In the instant case, neither Veneroso nor Debonis was indicted for the crime of complicity. Counsel was not ineffective for failing to request a jury instruction on the use of accomplice testimony.

The court did not abuse its discretion in overruling appellant's motion for new trial.

The second assignment of error is overruled.

The judgment of the Mahoning County Common Pleas Court is affirmed.

DISSENT

Grey, J., Concurs in part; Dissents in part

I concur in the majority opinion as to all of the assignments of error, but as to the Goshen Township count, I respectfully dissent. On that count, I would reverse the trial court and hold that the State failed to meet its burden of proof beyond a reasonable doubt. The only evidence on this charge

consists of Lordi saying he would like to bid on the fire extinguisher contract and the township clerk saying that she felt solicited.

The tenor and meaning of words are often determined by looking to the context. For example, the phrase, "I know where you live," could be thought of as being harmless or life threatening depending on the context in which it is said. The context, of course, is determined by the conduct of the speaker relative to what has been said. There is no evidence that Lordi bid on the contract, made any attempt to get the contract, spoke to anyone in a decision making position, or reduced Goshen Township's allocation or share of road repairs. The State's case is based on Spack's subjective impression of what transpired. It is not a matter of a comment being taken out of context, but rather a comment being given meaning without any context at all.

Even though multiple counts may be tried jointly for trial efficiency, it must be remembered that each count must be treated separately and reviewed on appeal separately. If this count were the only charge, and if the transcript in this appeal consisted of the single paragraph of Spack's testimony, this court would reverse on the weight of the evidence in a heartbeat. With all the investigations, publicity, charges, and indictments now going on in Mahoning County, there has developed sort of a presumption of corruption which may skew one's thinking. This court should avoid that trap, to treat each charge separately, and to insist on evidence which overcomes the presumption of innocence and proof beyond a reasonable doubt. I do not see such proof here and therefore would reverse this count on the weight of the evidence.

To uphold this conviction one must make several inferences, one upon each other. One must infer that a request

to bid in a contract, is a request for contract. One must infer that the request to bid made to a person who is not authorized to grant contracts was intended to be conveyed to the persons who are authorized. And then one must infer, without any proof, that road repair funds would be withheld although the decision on the repair funds was to be made in the near future while the decision on the fire extinguishers would not be made for another six months. One might make this string of inferences to reach some kind of a conclusion, but one could not say that such conclusion was true beyond a reasonable doubt. Therefore, I would reverse on that count.

Based on the foregoing, I respectfully dissent in part.